90-562

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MONICA GETZ,

Petitioner,

vs.

STANLEY GETZ,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED FOR REVIEW

1. Does New York State's matrimonial law, which permits abusive husbands to bring plenary suit against abandoned wives and impose the crippling economic burden of legal fees and expenses, discriminate against women in violation of the due process and equal protection provisions of the Fourteenth Amendment?

The New York Court of Appeals denied petitioner's motion for leave to appeal this question.

2. Does New York State's Domestic Relations Law, which permits a husband to sue his wife for divorce based on her alleged adultery, but bars evidence of the husband's admitted adultery before the trial jury as a defense, violate constitutional due process and equal protection guarantees?

The New York Court of Appeals denied petitioner's motion for permission to appeal this question.

3. Is it a deprivation of constitutional due process and equal protection for an intermediate state appellate court to summarily dismiss an appeal on substantive grounds, without full briefing and oral argument, where there is a statutory appeal as of right?

The New York Court of Appeals denied petitioner's motion for permission to appeal this question.

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Monica Getz petitions for a writ of certiorari to review the order of the Court of Appeals of the State of New York denying her motion for leave to appeal the Appellate Division's summary dismissal of her appeal from the final judgment in a divorce action instituted against her by her husband in 1981.

OPINIONS BELOW

The order of the Court of Appeals of the State of New York, entered on July 2, 1990, (not yet reported) (App. A) denied petitioner's motion for leave to appeal the summary dismissal of Mrs. Getz's (defendant below) appeal from the final judgment of divorce to the Appellate Division, Second Department, entered

on December 7, 1989 (App. B). The Appellate Division also denied petitioner's motion for reargument or, alternatively, for permission to appeal to the Court of Appeals by order entered on February 5, 1990 (App. C). The judgment of the New York State Supreme Court, Westchester County, granting divorce, was entered on October 7, 1987 and the judgment on the financial issues and dismissing petitioner's defense of recrimination was entered on March 10, 1989.

JURISDICTION

This petition for certiorari is from a final order of the New York State Court of Appeals entered on July 2, 1990, denying petitioner's motion for leave to appeal the order summarily dismissing petitioner's appeal from final judgment in the divorce action to the Appellate Division, Second Department, entered on December 7, 1989. 28 U.S.C. Section 1257 (3). The summary dismissal, which the Court of Appeals refused to review, raises federal constitutional issues.

PROVISIONS INVOLVED

Due process and equal protection clauses of the Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 170 of the New York State Domestic Relation Law:

§ 170. **Action for divorce**

> An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:
>
> (1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being

> of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant;
>
> . . .
>
> (4) The commission of an act of adultery. . . voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. . . .

Section 171 of the New York State Domestic Relation Law:

§ 171. **When divorce denied, although adultery proved**

> In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:
>
> . . .
>
> 4. Where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce.

Section 173 of the New York State Domestic Relation Law:

§ 173. **Jury Trial**

> In an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce.

STATEMENT OF THE CASE

This petition challenges the constitutionality of New York State statutes relating to divorce actions, as well as the denial of appeal rights in violation of the due process and equal protection guarantees of the Fourteenth Amendment.

The principal issue raised by this petition is the gender bias of the New York State statute which permits removal of divorce proceedings from the specialized Family Court, at what amounts to the husband's option, to a commercial court where the husband can engage in prolonged, vindictive litigation until his wife's limited resources are depleted and she is forced to capitulate on

the most unreasonable demands. This case has been pending in such a court for nine years, forcing the wife to incur unpaid legal bills of over $600,000, now constituting a lien on the family home which must soon be sold to satisfy creditors, leaving her after 25 years – as a housewife and mother – with no rental income source or family base for her and her children and grandchildren during her mature years.

The petition also challenges the gender bias of the New York State statute which permits a husband to seek a divorce on grounds of adultery allegedly committed long after he had abandoned his wife to move in with someone else, and allows the trial jury to hear evidence only relating to the wife's alleged adultery and not of the husband's admitted adultery, even though such adultery constitutes a complete defense to the husband's claim. In this case, the trial judge instructed the jury to consider the wife's adultery on both of the grounds on which the husband sued for divorce (adultery and cruelty) while postponing separate consideration of the husband's adultery until after the jury verdict. The statute permitting this discrimination is a plain denial of due process and equal protection in the context where husbands are given the statutory advantage of initiating jury trial divorce proceedings when they decide to shed their wives.

Finally, this petition challenges the drumhead justice meted out to petitioner by the appellate courts of New York State in this case. Petitioner duly filed her appeal from the final judgment in the divorce action and concentrated her appeal on the due process issue of allowing the trial jury to hear evidence of her alleged adultery but not that of her husband's (discussed above). The appellate court refused to hear the case, and dismissed it instead on motion of the husband, based directly on the main substantive question raised on the appeal. This summary disposition of the controlling issue on an appeal to which the petitioner was entitled as of right was in total violation of her equal protection guarantees and must be set aside.[1]

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[1] The federal constitutional question in Question No. 1 *supra* was raised in the New York State Court of Appeals in Mrs. Getz's motion for leave to appeal from the Appellate Division's summary dismissal of her appeal from the Judgment

(Footnote continued)

The Facts

Stanley and Monica Getz were married on November 3, 1956. She was 21 years old. It was her first marriage, his second. She undertook to raise her husband's three small children, who were facing court custody because of their natural mother's alcoholism, drug addiction and subsequent abandonment, and their father's recent six-month jail sentence for a drug-related armed robbery and subsequent suicide attempt.

Stanley Getz was bankrupt, with a suitcase full of unpaid bills and creditor demands. He was in trouble with the IRS for having spent the withholding taxes of his musician/employees, and never having filed returns or paid taxes. He had no home of his own, no furniture, and his relatives were taking turns caring for his small children.

Monica Getz set up housekeeping with the youngsters in a one-bedroom apartment in the Bayside, Queens home of her husband's parents. Later the couple moved to a rented house in Great Neck, where for the first time the children attended school regularly and began to taste a healthy family life. Monica helped her

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of Divorce, in the Conclusion of the Brief at p. 30: "This case stands as a monument to the potential for abuse of New York's matrimonial laws. In this one case legal fees of an estimated one million dollars have been run up because the legal establishment knows only one way to deal with marriages where the husband decides to leave his wife – let the parties fight it out until their resources are eaten up by lawyer's fees. Then sell the family home to pay off the lawyers, and leave the abandoned wife not only without a home, but also without financial security or faith that there ever was such a thing as justice in the judicial system." Question No. 2 was raised in the same motion. *Id.* at p. 30: "The New York court system has allowed itself to be used to generate huge legal fees over false and distorted accusations while denying the most basic due process rights to the abandoned wife – rights which the courts jealously guard for murderers, narcotics pushers, muggers and rapists." Question No. 3 was also raised in the motion to appeal *Id.* in the Statement of Questions Presented for Review at p. 1: "Does the summary dismissal *on the merits* of an appeal as of right directly affecting marital status, without oral argument or full briefing on the issues, violate the Judiciary Article and due process guarantees of the New York State Constitution and the Fourteenth Amendment of the United States Constitution?" *See also* Point I of that Brief, headed: "STATE AND FEDERAL CONSTITUTIONAL GUARANTEES REQUIRE THAT WHEN AN APPEAL IS AFFORDED UNDER STATE LAW IT CANNOT BE GRANTED TO SOME LITIGANTS AND ARBITRARILY DENIED TO OTHERS"

husband get back the cabaret license that had been withdrawn when he was jailed, so he would be allowed to work in New York to be near his family.

To get away from the worsening drug scene, Stanley and Monica moved to Denmark. In 1961, Stanley Getz succumbed to the pull of the music in New York and the couple returned and lived in a series of rented houses. The settlement with the IRS, reached in the meanwhile, took most of their net income.

In 1966, using funds supplied by her family, the couple purchased "Shadowbrook," a rambling house near the Hudson River in Irvington, New York, where their five children (three by the former wife; two by Monica) were raised. Shadowbrook has remained the family home ever since, supported by the rent derived from tenants and a bed-and-breakfast operation. For 25 years, Monica kept the Getz home going, raised and educated the children, ran the household, managed the property, and served as her husband's business manager and promoter, for all of which she received no compensation.

By the late Sixties, it was apparent that Stanley Getz – who had, with his wife's help, achieved international musical and financial success as a jazz saxophonist through concerts, television appearances and recordings – was switching his dependence from drugs to alcohol. He grew unpredictably violent. Many of his professional relationships were destroyed. His children were alienated emotionally and, at times, abused physically.

Monica persuaded her husband to undergo treatment at the Hazelden Foundation in Minnesota, a leading alcoholism treatment center, and accompanied her husband there for what was to be a protracted period. At Hazelden, she was taught not to accept abuse and violence, that addiction and the resultant behavior is a treatable disease, and that a protective court order could not only shelter the family but provide leverage for treatment in the event of relapse. On Hazelden's recommendation her husband became the patient of Dr. Ruth Fox, who prescribed Antabuse, a drug that induces an allergic reaction when ingested with alcohol, and instructed Monica – with her husband's approval – to put Antabuse routinely in his orange juice. Stanley

later employed many varied ruses to avoid taking Antabuse whenever he decided to resume drinking.

Stanley Getz's drinking bouts became infamous. More than once he went berserk in the house, forcing his family to flee to the safety of a hotel, sometimes in the middle of the night. Refusing to change his lifestyle, he withdrew all his funds and disappeared to England and then to Spain, leaving his family to fend for itself, at which point Monica took the children to her family's home in Europe in an attempt to continue their education in peace.

Stanley Getz bottomed out in Spain, broke and abandoned by a series of young female companions. He telephoned Monica and their youngest daughter to come rescue him. Removed to England, he slowly recovered at the Greenway Nursing Home in London and resumed taking Antabuse. But when Monica went off to Sweden to arrange for their other children to join them, Stanley relapsed. He began to drink again and became increasingly hostile. The daughter realized that he was not taking his medication and secretly gave it to him in his breakfast. He had a mild physical reaction, concluded that he was allergic to alcohol, and was continued on Antabuse at Dr. Fox's urging (to prevent further violence and to facilitate his participation in AA, which he had avoided).

For most of the 1970's the husband's health, career, family life and finances flourished. The approach of the 1980's brought a new generation of young musicians to the Getz band, and with them, cocaine, on which Antabuse has no effect. Stanley was soon back on drugs.

One day while Monica and Stanley were on a family vacation in North Africa in early 1980, he — in the presence of Mrs. Getz's mother and other family members and friends — telephoned a prostitute in New York, who flew to Dakar at his expense to sleep with him. Monica left with her mother and some of the children. After being threatened physically, she then decided to obtain a protective order, file for divorce and seek a family intervention. Her objective was to bring home to her husband that

he had to take responsibility for his own health and actions. She was no longer willing to put up with his womanizing and unpredictable violence while she was struggling to protect him from the fearsome consequences of addictions that demanded professional treatment. The husband turned to a doctor friend, who minimized his problem and tried to dissuade the family from taking action. The he left on an extended concert tour, claiming everything was "under control."

Upon Stanley Getz's return in May, 1980, he verbally attacked his musicians, and then physically attacked Monica so viciously that she had to be hospitalized. He was arrested and sent by the Family Court for treatment at Hazelden. Stanley asked Monica to join him at Hazelden for a reconciliation. They then went on a European tour together, on the last day of which he again began drinking and suddenly, without provocation, tried to throw her out of a sixth-floor window. He himself then returned to Antabuse, followed by another reconciliation. The couple then made a joint trip to South America and on to Florida where they were joined for Christmas by their youngest son, who was undergoing knee surgery. On New Year's Eve, 1981, Stanley commenced drinking again, and without provocation attacked the son, who was on crutches.

An attempt at intervention was arranged in New York by the husband's then attorney. Stanley fired his lawyer from California, and said he would starve his family until they accepted the fact that "a man is entitled to drink in his own house."

The New York Family Court issued a support order. Two lawyers later, the husband was advised to institute this divorce action based on allegations that the administration of Antabuse constituted "cruelty". Subsequently the husband became a resident of California, where a low-cost, no-fault divorce was readily available without incurring high legal fees on both sides. His New York lawyers, however, persuaded him to pursue his divorce action in New York instead, where litigation is unrestricted and fees can mount astronomically, and matrimonial litigation can be converted into an instrument of revenge and persecution. (So far, the fees incurred by both sides in this case conservatively total

one million dollars which can only be paid by forcing the sale of the family home and distributing the proceeds to the attorneys.)

Still another reconciliation followed, this time in California. A financial agreement was arrived at and made the subject of a 1982 Family Court order. The husband returned to his home in New York, where he was booked for an engagement, followed by a European tour. Then came the inevitable resumption of drinking and abrupt cancellation of family plans to join him for the Easter holidays in San Francisco. Monica returned for a time to Sweden, where she founded the Council on Alcoholism and Other Drug Addiction and organized a major conference in Stockholm.

The New York divorce action was taken off the calendar for almost two years at the request of the husband's attorney while he once more attempted to overcome his alcoholism. Eventually the case went to trial in 1987, resulting in a jury verdict in favor of the husband. The proof at trial focused on Monica's administration of Antabuse and an alleged adulterous relationship between her and a family friend following Stanley's abandonment. She testified at trial that she had never been unfaithful to her husband – despite his many girlfriends. (A post-trial polygraph test has confirmed the truthfulness of her denials.) The trial judge refused to allow *any* of the evidence of *the husband's* admitted adultery to go before the jury, and instead instructed the jury they could consider the one-sided evidence of the *wife's* alleged adultery on the issue of *cruelty* – which is the specific basis for this appeal.

Monica Getz has been denied *every single attempt* to have the trial court's rulings and jury charge reviewed on appeal. The incompleteness of the court reporter's trial transcript, combined with the trial judge's refusal to settle the record on appeal, resulted in the dismissal of her first appeal. Subsequent appeals have all been dismissed on *res judicata* grounds. *Never once have the issues been considered on the merits.*

The result of this lengthy matrimonial litigation has been to force the wife to near-destitution. On January 12, 1990, the trial judge issued an order directing the Sheriff of Westchester County to execute a contract and deed to sell the family home which

is the only base her family possesses, and which is the wife's only direct source of income (from rents). Meanwhile the husband's lawyers have exploited their client's notoriety for publicity purposes. An article in the March 1990 issue of *Manhattan, inc.*, contains a lengthy profile (at pages 62-67) of the husband's attorney, Jeffrey Cohen ("the ferocious matrimonial lawyer") touting his actions in this case after he invited the magazine writer to accompany him to the New York Supreme Court in White Plains in his "chauffeured" car for "another episode in what he [Cohen] calls his most brutal piece of litigation." (*Id.* pages 65-66). The magazine writer describes Mr. Cohen's courtroom presentation seeking the wife's eviction from the Getz family home as "vintage Cohen: raging barrister with a brutal, caustic one-two combination" (at page 66). This case – and the wife's – have become public relations fodder for "the man who would be king of matrimonial attorneys" (page 62).

The wife's entire life has been left in shambles by this case. She has been branded an adulteress. She has become obligated to pay legal fees of many hundreds of thousands of dollars. She is being forced out of her home, and to give up her old age security and the children's inheritance. She has been denied the most rudimentary appellate review of an unfair trial. The course of this case has been "drumhead justice" at its worst.

REASONS WHY WRIT SHOULD BE GRANTED

Specific Legal Issues to be Addressed

1. Section 170 of New York State's Domestic Relation Law specifically permits "a husband or wife" to sue for divorce in the state's highest court of general jurisdiction. In reality, as the New York courts themselves have found, this statute predictably gives that choice overwhelmingly to husbands and denies equal access to women. The statute forces *wives* into an arena for which they rarely have sufficient resources, and where their only realistic options are capitulation or economic ruin. The statute also permits *husbands* to nullify the family protection provisions of New York's Family Court Law by the institution of plenary litigation to override the low-cost statutory mediation procedures designed to resolve family disputes without significant cost, delay and

unnecessary acrimony. Section 170 therefore violates both the due process and equal protection guarantees of the Fourteenth Amendment.

2. Sections 171 and 173 of New York State's Domestic Relations Law mandate factual determination of the *wife's* alleged adultery in a divorce action to be made by a *jury*, while the factual determination of the *husband's* alleged adultery is made by the *judge*, with no knowledge on the jury's part of the husband's misconduct while it decides the wife's fate. This arbitrary discrimination is a deprivation of due process and equal protection under the Fourteenth Amendment.

3. New York State provides an appeal as of right from a final judgment in a divorce action. Once a state creates a right to appeal by statute it must administer it without discrimination. In this case, petitioner's appeal from the final judgment in the divorce action, raising a disputed issue of law, was dismissed on motion without allowing the wife the opportunity of presenting the matter to the full bench in open court or permitting complete briefing and oral argument as provided under the State's procedural statutes and rules. This arbitrary procedure denied petitioner due process and equal protection under the Fourteenth Amendment.

ARGUMENT

POINT I

NEW YORK'S PRESENT STATUTE AUTHORIZING HUSBANDS TO INITIATE PLENARY DIVORCE ACTIONS IN THE STATE'S PRINCIPAL COMMERCIAL COURT IS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION TO WOMEN

Stripped of its details, this is a case about the rights of married women in our society. It represents barbaric abuse of equal rights, permitting a husband to abandon his wife of many years; take up with a live-in girlfriend; sue the abandoned wife for divorce; force the sale of the family home; saddle the wife with huge attorneys' fees; and then throw her out in the street to fend for herself. All of this has been made possible by Section 170 of New York's Domestic Relations Law.

The fact that Monica Getz is on the verge of losing her home and being forced into near-indigence is a human tragedy caused by the inability of New York's court system to control matrimonial litigation run amuck. This case is a classic example of institutionalized gender discrimination under an obsolete system of laws established in a dark age when women were vassals.

Divorce actions, like other legal proceedings involving the family, should be administered by tribunals experienced in preserving marital assets, protecting children, dealing with substance abuse, and salvaging whatever good can be preserved in human relationships. They do not belong in the free-for-all marketplace of commercial litigation, where women and children have no champions and the rules of practice permit legal wars of attrition.

Factual Basis for Claim of Gender Discrimination

In 1984, the Chief Judge of the State of New York created a "Task Force on Women in the Courts" to investigate the existence of gender bias in the New York State Court system. The Task Force was given a broad mandate to investigate all aspects of the court system, both procedural and substantive. The Task Force was composed of a broad mix of judges, lawyers and knowledgeable laypersons.

In March 1986, the Task Force filed the report of its findings (which is published in Volume 15, page 1 of the Fordham Urban Law Journal as well as in an official volume issued by the Office of Court Administration of the New York State Unified Court System). A summary report of the Task Force findings and recommendations, which was issued simultaneously, begins with the following statement:

> The New York Task Force on Women in the Courts has concluded that gender bias against women litigants, attorneys, and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment, and equal opportunity.
>
> (Task Force Summary Report, 1986, p. i)

The 1986 report presented findings on discrimination against women in many contexts (e.g. as victims of violence, in custody cases, as attorneys, as court employees). The most significant findings for purposes of this petition were those dealing with women as parties to divorce proceedings in New York State.

The overriding conclusion of the Task Force report was that divorce causes "extreme economic dislocation" for women in New York State, contributing to a significant increase in the number of women living in poverty:

> The "feminization of poverty" – the disproportionate representation of women among New York's poorest citizens – has impelled the legislative and executive branches of government to identify causes and seek solutions. For most women, unlike men, divorce causes extreme economic dislocation and thus has contributed significantly to the swelling ranks of female single-parent heads of households living in poverty.
>
> (*Ibid.* p. 17)

The New York State Legislature "reformed" New York's divorce laws in 1980 by enactment of the "Equitable Distribution Law," which purported to give women increased rights to share in family economic resources in the event of a divorce. The Task Force found, however, that under the existing divorce system in New York State, women continue to be victims of discrimination:

SUMMARY OF FINDINGS

a. The manner in which judges distribute a family's assets and income upon divorce profoundly affects many women's economic welfare. Women who forego careers to become homemakers usually have limited opportunities to develop their full potential in the paid labor force.

b. The New York Court of Appeals has recognized that the Equitable Distribution Law embraces the view of marriage as an economic partnership in which the totality of the nonwage-earning spouse's

contributions – including lost employment opportunity and pension rights – is to be considered when dividing property and awarding maintenance.

c. Many lower court judges have demonstrated a predisposition not to recognize or to minimize the homemaker spouse's contributions to the marital economic partnership by:

(i) Awarding minimal, short-term maintenance or no maintenance at all to older, long-term full or part-time homemakers with little or no chance of becoming self supporting at a standard of living commensurate with that enjoyed during the marriage.

(ii) Awarding homemaker-wives inequitably small shares of income-generating or business property.

d. Economically dependent wives are put at an additional disadvantage because many judges fail to award attorneys' fees adequate to enable effective representation or experts' fees adequate to value the marital assets.

e. Many judges fail to order provisional remedies that ensure assets are not diverted or dissipated.

f. After awards have been made, many judges fail to enforce them.

(*Ibid.* pp. 17-18)

Section 170 was last re-enacted by the New York State Legislature in 1975. Although neutral in form, the statute is not neutral in application. It inescapably favors husbands who control the economic resources in most families by permitting them to unleash litigation blitzkriegs against their wives. When the New York Legislature re-enacted Section 170 the foreseeable impact was so disproportionately unfair to women that the burden rested on the State to establish that gender-biased considerations played no part in the legislative scheme. *Cf. Castaneda v. Partida*,

430 U.S. 482, 51 L.Ed.2d 498, 97 S.Ct. 1272 (1977); *Washington v. Davis*, 426 U.S. 229, 241, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976); *Alexander v. Louisiana*, 405 U.S. 625, 632, 31 L.Ed.2d 536, 92 S.Ct. 1221 (1972); *see generally* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1981 Sup. Ct. Rev. 95, 123.

This Court has often questioned the purposes behind facially neutral policies by considering the degree, inevitability and foreseeability of disproportionate impact, as well as the alternatives reasonably available. *See Monroe v. Board of Commissioners*, 391 U.S. 450, 459, 20 L.Ed. 2d 733, 88 S.Ct. 1700 (1968); *Goss v. Board of Education*, 373 U.S. 683, 688-689, 10 L.Ed.2d 632, 83 S.Ct. 1405 (1963); *Gomillion v. Lightfoot*, 364 U.S 339, 5 L.Ed. 110, 81 S.Ct. 125 (1960); *Griffin v. Illinois*, 351 U.S. 12, 17 n. 11, 100 L.Ed. 891, 76 S.Ct. 585, 55 ALR2d 1055 (1956). *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425, 45 L.Ed. 2d 280, 95 S.Ct. 2362 (1975).

The present New York State divorce statute perpetuates the obsolete, archaic status of women as vassals subject to the domination of their "lords and masters". Statutes premised on such assumptions have previously been held by this Court to be invalid. *See Orr v. Orr*, 440 U.S. 268, 59 L.Ed. 2d 306, 99 S.Ct. 1102 (1979); *Califano v. Goldfarb*, 430 U.S. 199, 210-211, 51 L.Ed. 2d 270, 97 S.Ct. 1021 (1977); *Stanton v. Stanton*, 421 U.S. 7, 14, 43 L.Ed. 2d 688, 95 S.Ct. 1373 (1975); *Weinberger v. Weisenfeld*, 420 U.S. 636, 645, 43 L.Ed. 2d 514, 95 S. Ct. 1225 (1975).

The family relationship does not belong in a forum created to resolve commercial disputes. Uncontrolled litigation, fueled by vindictiveness, abusiveness, or similar motives, should be curbed, not encouraged. Less discriminatory alternatives are available, e.g. the Uniform Marriage and Divorce Act, portions of which have been adopted in the State of Delaware, which vests the jurisdiction over divorce actions exclusively in the Family Court. Delaware Code (1974), Title 13, Section 1504. All hearings and trials are held before judges or masters experienced in family matters; costs to the parties are kept to a minimum; and the court has jurisdiction over all questions of support and custody.

In addition, Delaware's Imperiling Family Relationship Act, Delaware Code, Title 10, Section 901, permits assessment and evaluation of alcoholism, chemical dependence and other family disfunctions, and empowers the court to mandate treatment. The discriminatory nature of Section 170 should be viewed against the range of less discriminatory alternatives. *Cf. Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 425. No valid governmental objectives are served by the gender-based discrimination in New York's present divorce statute.

Impact of Section 170 on this Case

When Stanley Getz was caught up in the drug culture of the music world late in the seventies, his violence escalated, and with it the risk of permanent injury to Mrs. Getz and members of their family. Mrs. Getz had no choice but to obtain an Order of Protection from New York's Family Court. In retaliation, Stanley Getz absconded to California in 1981, taking up with a live-in girlfriend, and deliberately cutting off his wife and family without any means of support. Mrs. Getz was then forced to return to Family Court for an Order of Support which was granted after four harrowing months during which she had to borrow money to buy food. Not only did Stanley Getz withdraw every moveable asset, he also instructed their insurance carrier to drop the health, life, and automobile coverage for his wife and children; to complete the purge, he cut off their credit, stopped supporting their son in college, and attempted to have their only automobile removed in the middle of night and sent to California.

In the course of expending his considerable resources to obstruct the Family Court orders, Mr. Getz hired and fired a succession of attorneys until he found one willing to institute suit for divorce. The obvious benefits of suing for divorce were three-fold:

1) The divorce litigation would be heard in Supreme Court, removing the case from Family Court which was applying pressure to compel support;

2) Since New York State has no unified court system, Mr. Getz could turn the tables and make himself the plaintiff and Mrs. Getz the defendant by the simple expedient of filing a new suit;

3) Once he had succeeded in putting all of his earnings and assets beyond the reach of the court, Mr. Getz could force the sale of the family home as if it were the couple's only asset.

Furthermore, Mr. Getz's attorney could argue in Supreme Court a proposition that might have seemed ludicrous in Family Court: that his client could *not* afford to support his wife while he was paying many hundreds of thousands of dollars in attorneys' fees, far in excess of what was owed to her.

The case has dragged on for years. For an extended period of time, it was marked off the calendar at the request of Mr. Getz's attorney so his client could undergo treatment for his alcoholism. Eventually, it was set down for trial.

Demonstrative of the lack of specialized judicial supervision of divorce proceedings in New York State is the fact that the male trial judge in this case was ordinarily assigned to try criminal cases. At the time he was assigned to the *Getz* case, he was totally inexperienced in domestic relations matters.

Petitioner contends that there were several basic legal errors in the conduct of the trial:

- the court's jury charge on cruelty.

- the court's denial of the wife's recrimination defense to the charge of her adultery (and cruelty).

- the court's instruction allowing the jury to consider evidence of the wife's alleged adultery on the cruelty charge, while reserving the husband's adultery for later trial.

None of these major legal errors have *ever* been reviewed on appeal. On six separate occasions, the Appellate Division summarily rejected the wife's appeals without full briefing of the issues or oral argument in any form.

Meanwhile the proceedings have left the wife's life in shambles:

- The trial judge ordered the sale of the family home even before final judgment was entered.

- The trial judge denied the customary stay pending appeal, and would not even allow the wife to post a supersedeas bond.

- The trial judge terminated the support order entered by the Family Court and awarded no maintenance in its place.

- The trial judge denied award of the wife's attorneys' fees.

The wife has been left virtually destitute, faced with huge bills for legal expenses and the humiliation of a divorce judgment based on sharply contested allegations, all to satisfy the whim of an alcoholic husband who decided he had enough of the wife who stood by him for 25 years, and wanted to take up a new lifestyle in California with younger women who had no scruples about living with a married man.

When the husband instituted his suit in New York State Supreme Court, the issue of his abusive behavior under the influence of drugs and alcohol was removed from the low cost expert mediation procedures of Family Court into the arena of full-blown commercial litigation – a forum where legal costs soar and where lawyers can generate exorbitant fees through tactics of delay and obstruction. The New York court system itself then destroyed what the wife had been able to salvage for the benefit of the children and the husband despite himself. Everything she has saved for the family was consumed in the kamikaze litigation process.

Wealthier parties have an overwhelming advantage in such "no holds barred" adversary proceedings. In the marriage relationship, the party with access to resources is almost invariably the husband.

In contrast to the conciliation promoted in Family Court, the object of divorce proceedings in State Supreme Court is to break up the marriage and divide up the property. These proceedings rapidly become costly wars of attrition fueled by the acrimony released in splitting the marriage. The property is eaten up by legal fees before it can be distributed and, as a rule, the wealthier party (the husband) will be the "winner" and the poorer party (the wife) the "loser." The wife is also the party with primary responsibility for child care and the one who remains economically dependant on their husband's income.

The effect of the present New York law authorizing the institution of divorce actions in the State's primary commercial court is to create a gender based, disfavored classification. This classification cannot withstand the "heightened scrutiny" to which it must be subjected under the well established rulings of this Court. *See Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985) *citing Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

The New York State Legislature's 1975 and 1980 reaffirmance of the system which perpetuates archaic, anti-female bias, is clear evidence that "a gender-based discriminatory purpose has, at least in some measure, shaped" the New York divorce law. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 276 (1979)

The disproportionate impact on women of the New York system was clearly foreseeable by the Legislature, and the hardships it imposes are plain and undeniable. That women have historically been burdened with social, political and economic handicaps is beyond dispute.[2] *See Califano v. Webster*, 430 U.S.

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[2] The Court has stated that "[o]f course, the historical background of the [Legislative] decision is one evidentiary source of proof of intentional discrimination." *McCleskey v. Kemp*, 481 U.S. 279, 298 n. 20 (1987) [Citation omitted.] This Court can take judicial notice that the membership of the New York State Legislature in 1966 (the year Section 170 was enacted) was overwhelmingly male.

313, 317-318 (1977) (recognizing "the long history of discrimination against women," especially "economic discrimination.") It was therefore inevitable that an expensive system of divorce litigation would be particularly onerous for wives. This Court has declared in such instances, that "[c]ertainly, when the adverse consequences of a [neutral] law upon an identifiable group" are sufficiently "inevitable," "a strong inference that the adverse effects were desired can be reasonably drawn." *Ibid.*, 442 U.S. at 279 n. 25.

It is particularly reasonable and necessary to draw this inference on the critical question of the Legislature's discriminatory intent:

> since reliable evidence of subjective intentions is seldom obtainable, [and] resort to inference based on objective factors is generally unavoidable. *See Beer v. United States*, 425 U.S. 130, 148-149, n. 4, 47 L. Ed.2d 629, 96 S.Ct. 1357 (1976) (Marshall J., dissenting); *cf. Palmer v. Thompson*, 403 U.S. 217, 224-225, 29 L. Ed.2d 438, 91 S.Ct. 1940 (1971); *United States v. O'Brien*, 391 U.S. 367, 383-384, 20 L. Ed.2d 672, 88 S.Ct. 1673 (1968)

Id. at 283 (Brennan, J. dissenting)

The inference of discriminatory purpose from the system's adverse impact on women is bolstered by the New York Legislature's re-endorsement of this result throughout the decades in which the Legislature has revamped D.R.L. § 170, *et seq.*, but still allowed the New York Supreme Court, the State's principal commercial court, to retain jurisdiction over divorce actions. This demonstration of tacit legislative approval of a system which is patently lopsided against women (*see Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 381-82 (1969)) indicates the presence of invidious anti-female discrimination in the Legislature's retention of the system.[3] In light of this "proof that

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[3] The Legislature's maintenance of the current system in the face of the evidence of its disparate impact upon women contained in the recent official New York

(Footnote continued)

a discriminatory purpose has been a motivating factor in the decision" to retain the grossly inequitable New York system of divorce litigation, "judicial deference [to the Legislature] is no longer required." *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977). The less costly alternatives reasonably available to New York's current system are not only evidence of discrimination, (*Cf. Monroe v. Board of Commissioners*, 391 U.S. 450, 459-60 (1968)), they are an example of what might be implemented as a fair and feasible substitute.

POINT II

THE STATUTORY PROVISION FOR SEPARATE CONSIDERATION OF THE HUSBAND'S AND WIFE'S ADULTERY IS A DENIAL OF DUE PROCESS AND EQUAL PROTECTION

This divorce action is founded on two causes of action: adultery and cruelty. The evidence of the wife's alleged adultery consisted of testimony that the wife was seen in her bedroom/office together with a visiting (terminally ill) Swedish doctor, Dr. Sune Byren, who was a family friend. The event allegedly took place in 1985, four years after her husband had abandoned her and at a time when he was admittedly living openly with another woman in California. The defendant-wife testified that no adultery had ever taken place. The doctor also denied it and testified that he could not possibly have committed adultery since he was impotent.

The proof of cruelty consisted of evidence that the wife was secretly administering "Antabuse" to the husband under doctor's advice in an attempt to prevent violence to himself and

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State Court System Task Force Report (*See supra*, pp. 12-14) is evidence of the Legislature's "current intent" to discriminate. *See McCleskey v. Kemp*, 481 U.S. at 298, n. 20, (1987) Thus, the Legislature's "invidious discriminatory purpose may. . . be inferred from the totality of the relevant facts," including the fact that the N.Y. divorce law "bears more heavily" on women than men. *Washington v. Davis*, 426 U.S. 229, 242 (1976)

his family from his alcoholism. The jury was also instructed that it could take into consideration on the cruelty charge, the evidence of the wife's alleged adultery.

The Defense of Recrimination

The wife asserted as an affirmative defense that the plaintiff-husband had lived with one Jane "Roe" [Jane Walsh] continuously for five years. (A - 45)[4] Although Section 171 of New York's Domestic Relations Law makes the plaintiff's adultery an absolute bar to a divorce on adultery grounds, the trial judge severed the trial as to the husband's adultery, and submitted the issues of the wife's adultery and cruelty to the trial jury, which found in favor of the husband on both grounds on May 29, 1987. (A - 4-21) At the time the issues were submitted to the jury, the trial judge charged the jurors that they could consider the evidence of the wife's alleged adultery on *both* the adultery and cruelty issues. (R - 2133-2135)[5] A post-trial statement by one of the jurors indicated that they did exactly that.[6]

The trial judge dismissed the affirmative defense of recrimination, asserting that the evidence was "entirely circumstantial." That finding was plainly refuted by the record. The husband unabashedly admitted that he had lived with his girlfriend Jane Walsh for five years – from 1982 until 1987 – and he repeated that admission under oath on *three separate occasions* during his testimony, including acknowledging the existence of a "palimony" agreement under which he had paid Ms. Walsh $10,000.[7] Since this was an uncontroverted *admission by a party*,

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[4] "A" refers to pages of the Appendix filed in the Appellate Division.

[5] "R" refers to Record on Appeal from Judgment of Divorce of October 6, 1987.

[6] The juror stated: "Look, if she could commit adultery she could be cruel and inhuman too." Record on Appeal from denial of motion for a new trial, at pp. 198.

[7] A- 78-79, A - 81, and A - 83-84.

the trial judge had no conceivable basis to discredit the testimony offered in support of the recrimination defense.

The husband's admissions were corroborated by his grown son, Nicolaus Getz, and by his former talent agent, Abby Hoffer.[8]

Plaintiff's sworn trial testimony that he lived with Jane Walsh for five years constituted an uncontroverted *judicial admission* which was binding and conclusive against plaintiff. *See Skelda v. MTA*, 76 A.D. 2d 492, 430 N.Y.S.2d 840, 842 (2d Dept. 1980). Yet the trial judge not only rejected the proof, he also kept it from the jury.

Impact on the Jury's Verdict

The very last instruction the trial judge gave the jury – at the critical moment the jury was brought back into the courtroom expectantly after the court's final charging conference with counsel – was for the jurors to consider the wife's adultery on the *cruelty* claim:

> THE COURT: Ladies and gentlemen, I further charge you that adultery is an element of the cause of action of cruelty. (Tr. of May 29, 1987, at p. 33).

This charge was given at the express request of plaintiff's counsel:

> MR. COHEN: Your Honor, I would ask your Honor to charge that adultery is an element with respect to the cause of action for divorce on the ground of cruelty.
>
> THE COURT: Yes, I will so instruct them.
>
> (Tr. of May 29, 1987, at p. 31).

Uncontroverted proof of the husband's adultery would have barred a finding of adultery by the wife if it had been submitted

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[8] A - 56-64 and A - 89-90.

to the jury. The jury's verdict against the wife on cruelty in the absence of such proof was therefore tainted by their consideration — at the court's instruction — of the evidence of the wife's adultery. Since the jury verdict on cruelty was a general one, the verdict should have been nullified.

Concealing the husband's adultery from the jury turned the character of the parties upside down. The wife was portrayed as the philanderer and the husband as a choir boy. The judgment on the cause of action for divorce based on cruelty was therefore invalid. Depriving Mrs. Getz of the right to a jury trial on her recrimination defense unfairly tipped the scales in his favor and violated constitutional due process and equal protection. *Lindsey v. Normet*, 405 U.S. 56 (1972) (rights afforded one litigant cannot arbitrarily be denied other litigants)

Denial of Equal Protection

Section 171 of the New York Domestic Relations Law provides that proof of the plaintiff's own adultery denies the plaintiff the right to a divorce even though the adultery of the defendant is established. New York courts have ruled that this defense is to be heard and decided only by the judge without a jury. *See Eliot v. Eliot*, 70 A.D. 2d 612, 416 N.Y.S.2d 328 (2nd Dept. 1979) The statute therefore unfairly and arbitrarily discriminates in favor of plaintiffs and against defendants by permitting juries to consider evidence of the defendant's alleged adultery in a vacuum, with the plain inference that the plaintiff is wholly innocent of wrongdoing. Moreover, since wives rarely have the resources to bring or pursue plenary divorce actions to judgment, this statute denies equal protection on gender grounds as well.

POINT III

PETITIONER WAS WRONGFULLY DENIED HER CONSTITUTIONAL RIGHT TO AN APPEAL

Mrs. Getz's appeal from the final judgment in the divorce action was filed and perfected in a timely fashion and she scrupulously observed all the applicable appellate procedures. The appeal however, was summarily dismissed *on the merits* by the appellate court on motion, without a hearing on the significant issue of law it presented. A single set of motion papers was a patently inadequate basis for consideration of the complex factual and legal questions presented on the appeal. Mrs. Getz was never given the opportunity to present her arguments in writing and orally to each member of the court. No respondent's brief or reply brief was ever served or filed. *See* CPLR Section 5528-5530. No oral argument was heard, and petitioner was denied the opportunity to clarify any of the appellate court's questions on the governing issues on appeal. These procedures are not an empty formalism but are designed to produce a just decision by a fully informed court. A summary dismissal on *substantive*, as opposed to *procedural*, grounds is believed to be unheard of in New York State. There is no statutory authorization for such a circumvention of the normal appellate process. The use of the procedure here was arbitrary and capricious and the result was devastating.

Petitioner Was Denied Equal Protection

This Court has held that refusal to afford each appellant an appeal on the same terms as other litigants violates the equal protection clause of the United States Constitution:

> This Court has held that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review. When an appeal is afforded, however, ***it cannot be granted to some litigants and capriciously or arbitrarily denied to others*** without violating the Equal Protection Clause.

> *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). (Emphasis added.) [Citations omitted.]

In New York State, appellate review has long been enshrined in judicial decisions as an "essential right." *Matter of Luckenbach*, 303 N.Y. 491, 496 (1952), *quoting Yates v. People*, 6 Johns. (N.Y.) 337, 364 (1810) ("Our law considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which considers himself aggrieved.") *See also* Hopkins, *The Role of An Intermediate Appellate Court*, 41 Bklyn. L. Rev. 459, 463 (1975) ("The notion is firmly rooted that a litigant is entitled to at least one review of an adverse final decision.") The Constitution of the State of New York affords litigants an elaborate structure of appellate courts. New York Const. Art. 6, sections 1 - 5, 8. Petitioner-wife, however, has arbitrarily been denied access to the constitution-mandated apparatus of appellate justice.

Discrimination against petitioner violated "[t]he Equal Protection Clause of the Fourteenth Amendment . . . which is essentially a direction that all persons similarly situated be treated alike." *Cleburne v. Cleburne Living Center* 473 U.S. 432, 439 (1985); (Citations omitted.)

There is no rational basis for denying Mrs. Getz the rightful measure of appellate justice which similarly-situated litigants receive as a matter of course. Her appeal of the trial court's equitable distribution decision was authorized by CPLR 5701. She complied with all procedural requirements under statutes and court rules. Nevertheless, she inexplicably received only a summary consideration and dismissal on the merits without briefing and argument to the full bench. The Appellate Division's action constituted a denial of equal protection under New York State laws guaranteeing the right to appeal to the Appellate Division. The New York Court of Appeal's refusal to review that arbitrary dismissal compounded that violation. This Court is petitioner's last chance to correct the injustice of this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
September 28, 1990

Respectfully submitted,

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APPENDIX

APPENDIX A

COURT OF APPEALS OF THE
STATE OF NEW YORK

STANLEY GETZ,

Respondent,

1-11 *v.* Mo. No. 543

MONICA GETZ,

Appellant.

ORDER

Motion for leave to appeal denied.

DECISION COURT OF APPEALS

July 2, 1990

APPENDIX B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

MILTON MOLLEN, P.J.
WILLIAM C. THOMPSON
RICHARD A BROWN
ALBERT M. ROSENBLATT, JJ.

Motion No. 9690

Stanley Getz, respondent, v
Monica Getz, appellant

DECISION & ORDER
ON MOTION

Motion by respondent to dismiss the defendant's appeal from so much of a judgment of the Supreme Court, Westchester County, entered March 10, 1989, as limited by the appellant's brief to that portion of the judgment as dismissed the defendant's defense of recrimination, which cannot be used as defense to a cause of action based on cruelty.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted and the appeal is dismissed, without costs.

MOLLEN, P.J., THOMPSON, BROWN and ROSENBLATT, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

December 7, 1989

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

MILTON MOLLEN, P.J.
WILLIAM C. THOMPSON
RICHARD A BROWN
ALBERT M. ROSENBLATT, JJ.

Motion No. 672

Stanley Getz, respondent,
v Monica Getz, appellant

DECISION & ORDER
ON MOTION

Motion by appellant for reargument of the respondent's motion to dismiss the defendant's appeal from a judgment of the Supreme Court, Westchester County, entered March 10, 1989, which was granted by order of this court dated December 7, 1989, or in the alternative, (2) for leave to appeal to the Court of Appeals from this court's order dated December 7, 1989 and (3) for oral argument on this motion.

Upon the papers filed in support of the motion and the papers filed in opposition thereto:

ORDERED that the motion is denied with $20 costs.

MOLLEN, P.J., THOMPSON, BROWN and ROSENBLATT, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

February 5, 1990